Supreme Court, U.S.
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93-993

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARINA VENTURES INTERNATIONALE, LTD. AND MARINA VENTURES, LTD. AND CONSTELLATION PLACE CORPORATION AND LF MARINA CORPORATION

Petitioners,

VERSUS

POLYTHANE SYSTEMS, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In order to permit a district court to exercise jurisdiction in a factually contested case over the persons of non-residents of the forum state, must the party urging personal jurisdiction prove the necessary facts by a preponderance of the evidence at trial or at an evidentiary hearing or may the reviewing court permit jurisdiction to be maintained solely on the basis of a prima facie showing made by affidavits whose truthfulness was initially contested and then disproved at trial?

Did the court of appeal adhere to the standard of review, established by this Court and other circuits in nonconstitutional cases, in order to determine the substantiality and consequent necessity for new trial of "harmless error" in cases in which:

1. the jury has been permitted to view inadmissible evidence without the opportunity for prepared cross-examination or rebuttal;

2. there was more than one erroneous evidentiary ruling;

3. the erroneous evidentiary matters have been substantially relied upon in argument;

4. the closeness of the liability issue was manifested by favorable jury interrogatories on three issues presented by the party against whom the verdict was rendered on liability?

PARTIES TO THIS PROCEEDING

Petitioners/Defendants:

Marina Ventures Internationale, Ltd. and Marina Ventures, Ltd.

Petitioners/Counter-Plaintiffs:

Constellation Place Corporation and LF Marina Corporation

Counsel for Petitioners:

Louis R. Koerner, Jr.

Plaintiff/Respondents:

Polythane Systems, Inc.

Counsel for Respondent:

Lansford O. Ireson, Jr.

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OPINIONS BELOW

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Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States District Court, Southern District of Texas, order rendered on May 24, 1991) Unreported and at A-36.

Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States District Court, Southern District of Texas, Findings and Recommendations rendered on June 26, 1991) Unreported and at A-39.

Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States District Court, Southern District of Texas, Order rendered on July 16, 1991) Unreported and at A-51.

Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States

District Court, Southern District of Texas, Interim Judgment rendered on December 9, 1991) Unreported.

Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States District Court, Southern District of Texas, Final Judgment rendered on December 18, 1991) Unreported.

Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States District Court, Southern District of Texas, Order denying Motion for Partial New Trial and for Judgment Notwithstanding the Verdict rendered on December 23, 1991) Unreported and at A-62.

Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al., (No. H-90-545, United States District Court, Southern District of Texas, Order Denying Motion for Reconsideration rendered on February 3, 1992) Unreported and at A-66.

APPELLATE COURT:

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 993 F.2d 1201 and Appendix at A-4.

The order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and for rehearing *En* Banc is reported at 4 F.3d 992 and Appendix at A-4.

JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on June 28, 1993 and denied the application for rehearing on August 23, 1993.

STATUTES INVOLVED

1. Fed.R.Evid. 103(a) - **Effect of erroneous ruling**:

   Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and . . . .

2. Fed.R.Civ.P. 61 - **Harmless Error**:

   No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent

with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

3. 28 U.S.C. § 2111. **Harmless Error**

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of parties.

STATEMENT OF THE CASE

The following is taken from the court of appeal opinion, 993 F.2d 1202, 1204 [A-5]. The one incorrect statement is highlighted and its incorrectness documented, with record references, *infra* at page 3. All of the Marina entities[1] are referred to *in globo* as Marinas.

> Two marina floating dock systems began to lose buoyancy. The manufacturer of the polyurethane flotation foam used in the docks' construction was notified that its product may be defective. In a preemptive move, the foam manufacturer sued for declaratory judgment, requesting that the court determine what liability, if any, it may have for the docks' problems. The designer, builder, and owners of the docks filed counter-claims. A jury found that the flotation foam was not defective, and that the manufacturer was not liable. Finding no reversible error, we affirm.
>
> Background and Procedural History
>
> Two marinas in Baltimore, Maryland, the Anchorage Marina and the Licorice Factory Marina (the "Baltimore Marinas"), were devel-

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[1] Marinas International, Marina Ventures International, Ltd., and Marina Ventures, Ltd. are referred to in globo as "Marinas." When necessary, Marinas International, Marina Ventures International, Ltd., and Marina Ventures, Ltd. are referred to respectively as "MI", "MVI", and "MVL."

oped by Marina Ventures International, Ltd. ("MVI"). Marina Ventures, Ltd. ("MV") built these facilities using a floating dock system comprised of laminated wood decking attached to pontoons filled with polyurethane flotation foam. The docks are anchored to a series of pilings driven into the seabed. This construction allows the docks to rise and fall with the tide.

Polythane Systems, Inc. ("PSI") manufactured some of the flotation foam used in the Baltimore Marinas. PSI shipped the foam as two liquids which were later blended together at the jobsites to produce solid foam material.

The marinas began to experience a loss of "freeboard," the distance between the docks and the water. Marina Ventures requested that PSI send a representative to inspect this problem. PSI declined to do so, stating that there was no indication that the loss of freeboard was attributable to their foam; moreover, there was a question as to whether PSI foam was used in the problem areas.

In reaction to Marina Ventures' allegations that it had sold defective flotation foam, PSI filed a declaratory judgment action in district court in Texas. Marina Ventures responded with motions to dismiss for lack of personal jurisdiction, and to transfer the action to the District of Maryland, where they were involved in litigation against another flotation foam manufacturer. A magistrate judge recommended against transfer, and that personal jurisdiction

> over the Appellants was properly exercised. **The district court adopted these conclusions.** Trial proceeded, and the jury returned a verdict against the Appellants. The court then assessed costs against Marina Ventures.

The record on appeal demonstrates that when, after receipt of the order [R-6] by the district court adopting the recommended decision of the magistrate judge and confirmation that no notice of the recommended decision had been given to Marinas, timely objections were filed [Dkt. 87, R-765-70] by Marinas but never ruled on by the district court.

STATEMENT OF NECESSARY FACTS

For over twenty years, all marinas built by Marinas or the corporate predecessor, MI, used cellular urethane for floatation and the same method of design and construction, with incremental improvements [TR-27]. The marinas were built with decking of laminated timber supported by large tubs filled with cellular urethane which supported the decking and maintained a relatively stable distance (freeboard) between the top of the decking and the water [TR-25, 26, 77, 92]. Marinas fur-

nished verbal and video evidence that other marinas (all identically designed), not using PDL or PSI products, had lost no freeboard over periods as long as fifteen years [TR-95, 97, 98, Exhibits MV-11, MV-12].

In 1982, Dick Wyke of Floatec, a commissioned agent for PSI, approached PSI to formulate a product suitable for marina floatation [TR-29-31, 172, 653] for the Texas South Shore Marina, the first marina (MI) to use PSI products. The product had a proprietary formulation and ingredients kept secret from Marinas [TR-34]. Marinas also built two structurally identical [TR-51-52] marinas in Boston Harbor, the first one, Pier 6, using North Carolina Foam urethane [TR-37-38] and the other, Piers 7-8, which adjoined it, using urethane provided by PSI [TR-39, 50] and by PDL, a defendant in separate floatation failure litigation pending in the District of Maryland. Pier 6 has lost no freeboard (See video, MV-12). The freeboard on Piers 7-8, although built later and with more protection [TR-48-50], has been seriously compro-

mised [TR-51], although the only difference between the two was the urethane [TR-53].

Marinas' theory of the case was that the formulation and ingredients in the PSI urethane were unsuitable for floatation purposes and deteriorated over time and exposure to normal and known environmental conditions, *i.e.* water [TR-399]. The chemical attributes of urethane, such as resistance to water penetration, are entirely dependent on the recipe and ingredients used [TR-382]. The critical ingredients in the stability and water resistance of the finished product are the polyols. The best floatation foams had traditionally been made with a single polyol containing a predominance of petroleum-derived polyether molecules [TR-412]. As the price of oil rose, systems houses, such as PSI, sought cheaper non-petroleum based substitutes to provide an acceptable product [TR-180, 192-93, 195, 466, 494-95].

PSI initially chose sucrose (sugar) based and polyester based (PET) polyols [TR-170, 179, 180]. When Wyke complained about performance problems at South

Shore Harbor, a third polyol, glycerol based, was added in order to improve the processing of the product (formation of cells) [TR-405, 469-70, 776]. This combination of ingredients suffered from significant physical problems with age and exposure to water [TR-398, 405-406]. These physical problems were caused because both the sucrose and the PET polyols hydrolyzed (dissolved in water) [TR-399, 400]. According to scientific literature used by Dr. Kaye and his deposition testimony (pp. 11-14, 17-18, 76-77), polyester-based urethanes hydrolyze at a rate twenty (20) times faster than polyether based urethanes [TR-422, 491]. The PET polyester polyols were made from ground coke bottles and X-ray film [TR-180]. The physical properties of the supplied polyols varied widely from batch to batch [TR-180-81, 395]. The better processing resulting from the glycerol was matched and exceeded by the progressive deterioration caused by the instability of the resulting urethane compounds [TR-403, 405, 406]. This meant that, while the new and unexposed urethane exhibited a high percentage of closed cells,

there was an immediate tendency to absorb water [TR-399] and a gradual tendency for the cell walls and cell structure to break down, hence accelerating, with the passage of time, the influx of water and the loss of floatation, buoyancy, and freeboard [Deposition of Dr. Kaye at pp. 13, 14, 16, 55, 56, 91].

PSI's theory of the case was that the dock design was defective, that Marinas did not have a trained engineer for the design of LF (not Anchorage), and that the floatation devices needed to be sealed with tops or by the other materials so that the urethane would not be exposed to water. PSI relied heavily on design changes made by Marinas after the floatation problems. PSI's theory of the case was substantially supported by hearsay of problems at the Hong Kong marinas and by an entirely unsupported hearsay statement (reported by its expert) that the problems at Boston marinas were caused by something other than the urethane [TR-535].

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A writ of certiorari should be granted in this case for the following reasons:

(1) This decision is in conflict with decisions of this Court and with decisions of various circuit courts of appeal on proof of jurisdiction at trial by a preponderance of the evidence and the test for harmless error.

(2) The court of appeal departed from accepted and usual course of judicial proceedings in its failure to enforce these standards and sanctioned such a departure by the district court, particularly in its refusal to grant a new trial on admittedly erroneous evidentiary rulings.

(3) The decision below represents important questions of federal law as to which this Court has not recently rendered a decision and as to which this decision conflicts with the rule in other circuits.

ARGUMENT AND AUTHORITIES

I. THE FAILURE TO REQUIRE PROOF OF PERSONAL JURISDICTION AT TRIAL BY PREPONDERANCE OF THE EVIDENCE

In the magistrate judge's recommended decision, PSI was found to have established a *prima facie* case of

personal jurisdiction. Marinas' timely objections to this decision were never considered by the district court. As predicted, PSI did not prove or even seriously attempt to prove its jurisdictional allegations at trial. The true facts, as proven at trial, were just the opposite.

Periodically, either the Texas applicator, Wyke of Floatec, or Sparks of PSI would solicit MVL or MVL would call for a quote on a quantity of material for a particular marina [TR-31, 32, 650, 656]. When the price was agreed, MVL would mail a written purchase order to PSI [TR-656]. This purchase order always included language incorporating the "Dick Wyke specification", a performance specification [TR-654-66] that was a part of the bargain with MVL [TR-658-59] and subsequently so held by the jury [R-916, A-53].

PSI would blend and drum the product and ship it to MVL in Baltimore or to a MVL marina under construction. The material was often shipped prior to the time the invoice was mailed and the MVL often got the product before the invoice arrived [TR-657]. Each in-

voice generally contained a reference to the MVL purchase order and often to the Dick Wyke specification [TR-33, 657]. Payment was made in several different ways: in advance, COD, or on credit terms [TR-660]. Until the floatation difficulties with the LF Marina, there was never any problem with the relationship [TR-34], rather it was "trouble free." Only after a loss of freeboard thought to be the result of product defects and in order to avoid responsibility, did PSI file suit in Texas. Moreover, the Texas applicator, contended by PSI to be Marinas' agent and accepted as such by the court of appeal, 993 F.2d at 1206, admitted that he was PSI's commissioned agent [TR-209-212, 226]. This was confirmed by Mac Hess, an owner of PSI during that time [TR-462-63].

The language on the back of the PSI invoices was taken from supplier's invoices [TR-665]. None of it was discussed with MVL nor any other customer [TR-666]. PSI's Sparks admitted that if a customer did not look at the back of the invoice, he may or may not notice the significant changes [TR-667]. The invoice itself [Ex-48A]

states that it is subject to the "terms and conditions" on the rear. The rear of the invoice had the simple caption, "CONDITIONS." [TR-668.] No one at MVL had read the back of the invoice until PSI sued [TR-88]. Prior to the problems with the marinas, MVL did not have a specification sheet [TR-83]. Had MVL known of PSI's attempt to limit warranty, the PSI product would not have been used [TR-88].

There was no evidence that MVI had purchased any of the defective PSI product. Other than its contacts with Wyke and Floatec, PSI's commissioned agents, there was a complete lack of jurisdictional contact by MVI with Texas. The court of appeal decision simply adopted (933 F.2d at 1204-06, A-7-12) factual conclusions of the magistrate judge [A-39, R-638], although these conclusions were either disproved or not proven at the trial.

The court of appeal decision [*id.*, A-15] placed great emphasis on the choice of Texas law and other parts of the "CONDITIONS" on the rear of the invoices, which consisted of 16 provisions typed in small print, none

even uppercase but No. 5. Locked away in No. 8 is the purported disclaimer of warranty and limitation on damages. No. 15 contained the alleged agreement to use the laws of Texas. None were "conspicuous." None "otherwise" came to the attention of MVL.

Such provisions are insufficient under the Texas Uniform Commercial Code. *See* §§ 2.302, 2.316(b), and 2.719, *Cate v. Dover Corp.*, 790 S.W.2d 559, 560-62 (Tex. 1990). The warranty and the choice of law provisions were not enforceable [*Id.*, at 561-562] and should have been disregarded for jurisdiction purposes. *Stuart v. Spademan*, 772 F.2d 1184, 1194-95 (5th Cir. 1985).

In its discussion of the standard of review and the burden on PSI in the district court, the court of appeal did not state whether or not PSI had borne its ultimate burden of proof at the trial of proving jurisdiction by a preponderance of the evidence. Rather, it adopted facts asserted in the district court by PSI, hotly contested by Marinas, and either not proved or disproved at the trial.

There is no reference to the trial transcript (Vol. VI-IX) but only to the pre-trial record (Vol. III).

Since the jurisdictional facts asserted by PSI were hotly contested (see Response to Reply Memorandum, etc., R. 615, Dkt. 72) in the pre-trial and disproved at the trial [TR. 210 (Floatec); 635, 637. 657, 658, 661 (invoices); 665, 667, 668 (disclaimer)], the court of appeal decision erred in not utilizing a standard of review which required that PSI prove its jurisdictional averments by a preponderance of the evidence, and, in so doing, rejecting any *prima facie* showing that may have been sufficient for the preliminary determination of jurisdiction.

In *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189-90, 56 S.Ct. 780, 785 80 L.Ed. 1135 (1936), the district court had made no jurisdictional finding and the record lacked evidence of jurisdiction. This Court found that the party who seeks the exercise of jurisdiction "must carry throughout the litigation the burden of showing that he is properly in court."

> If his allegations of jurisdictional facts are challenged by his adversary in any appropriate

> manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.

Contrary holdings in other circuits include *Boit v. Gar-Tec Products*, 967 F.2d 671, 674-676 (1st Cir. 1992) (discussing the various standards of proof, the lack of factfinding in the *prima* facie standard, the deferral of the preponderance standard to trial, and the right to trial by jury on this issue); *Volkswagenwerk Aktiengeselishaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) (preponderance standard at trial); *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 196-98 (2d Cir. 1990), *cert. denied*, 471 U.S. 1010, 105 S.Ct. 1879, 112 L.Ed.2d 116 (1990) (acknowledging confusion); *Serras v. First Tennessee Bank, N.A.*, 875 F.2d 1212, 1214 (6th Cir. 1989); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d

1392, 1396, n.1 (9th Cir. 1986); *Data Disc, Inc. v. Systems Technology Associates*, 557 F.2d 1280, 1284-1285 and n. 2 (9th Cir. 1977); and *Federal Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992) ("[w]hatever degree of proof is required initially, a plaintiff must have proved by the end of the trial the jurisdictional facts by a preponderance of the evidence.")

The failure of the court of appeal decision to analyze the jurisdictional facts on a "preponderance of the evidence" standard was contrary to this Court's holding in *McNutt* and the decisions of these other circuits.

II. IMPROPER STANDARD OF REVIEW OF HARMLESS ERROR

A. Summary of What Happened in the District Court

The district court permitted PSI to introduce Dr. Kaye's report [Exhibit 50, R-413-17, RE-18] and permitted and its publication to the jury [R-435]. This report was devastatingly relied upon by PSI as one of the foundations of its defense and of its counsel's closing argument [R-856-57, 871]. Other evidentiary problems compounded the adverse effect of this introduction.

B. Selections from the Court of Appeal Opinion

> If this was the only evidentiary peg on which the jury could hang its verdict, the report's admission would be reversible error. Such is not the case; the Appellee offered several explanations for the loss of freeboard at the Baltimore Marinas. Considering the record as a whole, we conclude that the erroneous admission of Kaye's report was harmless and did not effect any substantial rights of Appellants. [993 F.2d at 1208, and n. 11 quoted at A-24]

The cited test is: "An error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict." [993 F.2d at 1209, A-25]. This was an improper test given the record and conflicts with decisions of this Court and those of other circuits, discussed *infra* at 19-20.

C. Further Discussion of the Events in the District Court

The pre-trial order stated: "As a chemistry expert Dr. Kaye ***will testify*** on whether the product in question tested within the parameters set out in Polythane's technical bulletin." [Emphasis added.] Only on the last day of trial was it disclosed that PSI, despite contrary representations in opening statement [R-14-16, R-756], was not

going to bring Dr. Kaye to testify and that he would not be available to Marinas [R-755-56] for cross. Marinas' counsel stated at TR. 755, "I have a problem if they don't bring on Dr. Kaye since his report's in. He's a chemical expert." Later, Marinas' counsel stated: "They promised in opening statement that Dr. Kaye would come." The district court stated: "All right. Well, they lied apparently, so let's get on with it." [TR. 756.]

Kaye's conclusion that the PSI product tested within the parameters set out in the Polythane technical bulletin was the main foundation of PSI's defense. However, this conclusion was untrue and misleading, as had been established in the deposition taken of Dr. Kaye and as would have been established on cross-examination (See R. 981-987, RE. 17.) Record Excerpt 17 was a summary, sorted by topic, with page numbers, of Dr. Kaye's deposition, prepared for use in cross-examination. For instance, the samples analyzed by Dr. Kaye had not been exposed to water, and he admitted that samples exposed to water would have been degraded (18, 52, 91, 123).

However, and despite the objection of Marina, the district court did not take corrective action at that time [R-756] and declined [R-909] to charge the jury, as requested by Marinas [R-907], as to the adverse inference that could be drawn from this failure. *Georgia Southern & Florida Railway Company v. Perry*, 326 F.2d 921, 924-925 (5th Cir. 1964); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659-660 (11th Cir. 1988).

The closeness of the case is shown the jury answers to interrogatories 3, 9, 10, and 11 [A-53, 56, 57] were favorable to Marinas and found damage of $1,019,826 to LF and $767,326 to Anchorage. Only interrogatories on product defect were answered in the negative.

Fed.R.Evid. 103(a) states that an evidentiary ruling may not be reversible error "unless a substantial right of a party is affected." See also Fed.R.Civ.P. 61 ("No error ... is ground for granting a new trial or for setting aside a verdict ... unless refusal to take such action appears to the court inconsistent with substantial justice"); 28 U.S.C. § 2111 (1982) (appellate court should give judgment

"without regard to errors or defects which do not affect the substantial rights of parties").

Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946) establishes a test that mandates a "harmless error" analysis and result different from that reached by the Fifth Circuit:

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The *Kotteakos* standard, which applies both to civil and criminal cases, has been the subject of intense analysis in this Court, dissent of Blackmun, J., *Darden v. Wainwright*, 477 U.S. 188, 197, 106 S.Ct. 2475, 2749-50 (1986) ("the question before the reviewing court is never whether the evidence would have been sufficient to justify conviction, absent an error, but rather whether the

error undermines its confidence in the outcome of the proceeding to an unacceptable degree."); *United States v. Lane*, 474 U.S. 438, 448, n. 11, 449, 455-65, 476-478, 106 S.Ct. 725, 731, 732, 735-40, 746-747, 88 L.Ed.2d 814 (1986) (painstaking and through review of the entire record); culminating in *Brecht v. Abrahamson*, ___ U.S. ____, 113 S.Ct. 1710 (1993) (*See* Stevens, J., concurrence, 113 S.Ct. at 1723-25, O'Connor, J., dissent, 113 S.Ct. at 1731.)

The conflict in the circuits was recently acknowledged in *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1023, n. 5 (D.C. Cir. 1990) (applying *Kotteakos*). Other circuits have also applied a test inconsistent with that utilized by the Fifth Circuit: *Robbins v. Whelan*, 653 F.2d 47, 52 (1st Cir. 1981); *Lataille v. Ponte*, 754 F.2d 33, 37-38 (1st Cir. 1985); *Amatucci v. Delaware & Hudson Railway Co.*, 745 F.2d 180, 183 (2d Cir. 1984); *Breidor v. Sears Roebuck & Co.*, 722 F.2d 1134, 1141 (3d Cir. 1983) (expert case); *Habacker v. Copperloy Corp.*, 893 F.2d 49, 53 (3d Cir. 1990) ("[E]rrors in civil cases (like errors in criminal cases) are not harmless unless it is "'highly probable'"

that they did not affect a party's substantial rights. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-28 (3d Cir.1985)"); *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34, 41-42 (3d Cir. 1989) (expert); *Habecker v. Clark Equipment Co.*, 942 F.2d 210, 216-217 (3d Cir. 1991) (closing argument); *Advanced Medical, Inc. v. Arden Medical Systems, Inc.*, 955 F.2d 188, 200 (3d Cir. 1992); *Werner v. The Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1979) (error going to the most fundamental question in the case); *Gulbranson v. Duluth, Missabe and Iron Range Railway Company*, 921 F.2d 139, 42-43 (8th Cir.1990) (evidence not overwhelming, closing argument); *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992) (acknowledging intracircuit conflict and discussing the practical difference between "fair assurance" and "more probable than not."); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 398 (10th Cir. 1985) (jury argument); *United States v. One Parcel of Real Estate*, 963 F.2d 1496, 1503-1504 (11th Cir. 1992.

Please see R. Traynor, *The Riddle of Harmless Error*, 16-23 (1970); Wright & Miller, Federal Practice & Proce-

dure, § 2883 at 275-280 (discussing, *inter alia, Kotteakos* and Traynor); Berger, When, if Ever, Does Evidentiary Error Constitute Reversible Error?, 25 Loy. L.A. L. Rev. 893 (1992) (discussing the type of plus factors, such as those present in this decision that have influenced a finding of substantial error and required a new trial).

CONCLUSION

Justice demands that deceit and misrepresentation in the pre-trial calculated to take advantage of a lower, *prima facie,* burden of proof be exposed and corrected at trial on the merits. The failure of the courts below to review the absence of jurisdictional showing made by PSI at trial by a preponderance-of-the-evidence standard means that this opportunity, of constitutional dimension, was lost. To the extent that PSI's pre-trial affidavits and other showings, hotly contested by Marinas, were demonstrated as false at the trial, so that facts accepted by the court of appeal were actually either not true or not proved or disproved by a preponderance of the evidence, the failure to utilize the proper standard of review

may have an adverse impact on the administration of justice in jurisdictional matters in which the district court is mandated to construe disputed issues in favor of jurisdiction. Only if false allegations and false proof are subject to severe consequences at trial will there be any disincentive. In the absence of the use of the proper burden in the district court and the establishment of a proper standard of review, a different message is conveyed.

The court below found that PSI's use of the Kaye report at trial, as an exhibit and for other reasons, constituted error and an abuse of discretion [A-20-21]. In other circuits, this would have required a new trial in which this evidence would either be excluded (and not reviewed carefully by the foreman of the jury for a half an hour and taken unredacted into the jury room) or Dr. Kaye would have been subject to the devastating cross-examination [RE-17] that had been prepared and on which Marinas built its entire evidentiary presentation.

Marinas' entire case was predicated on the chemical failure of the PSI product. All of the alternate theories

advanced by PSI (n. 11, A-24) would not have "held water" but for the jury's non-belief that the sinking of the marinas (not disputed) was a consequence of the propensity of the urethane (whether initially closed cell or not) to take on water and slowly dissolve over a period of time, thus increasing sinking and loss of freeboard.

Here again, the failure of the court of appeal to adhere to the standard of review of this Court and other circuits and its focusing on other possible explanations in order to justify the jury's conclusion denies Marinas' right to jury determination and simply encourages litigants to engage in such conduct because this standard of review fails to focus on the impact on the jury but solely on other justifications for the jury's result.

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APPENDIX

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2. *Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al.*, C.A. No. H-90-545 (United States District Court, Southern District of Texas, April 2, 1990) (Minute Entry).

3. *Polythane Systems, Inc. v. Marine Ventures International, Ltd., et al.*, C.A. No. H-90-545 (United States District Court, Southern District of Texas, May 24, 1991) (Minute Entry).

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10. *Polythane Systems, Inc. v. Marina Ventures International, Ltd., et al.*, No. 92-7058/7310 (Fifth Cir. August 25, 1993) (Rehearing denied, 4 F.3d 992).

United States Court of Appeals,
Fifth Circuit.
Nos. 92-7058, 92-7310.

POLYTHANE SYSTEMS, INC., Plaintiff-Counter Defendant-Appellee,

v.

MARINA VENTURES INTERNATIONAL, LTD., and Marina Ventures, Ltd., Defendants-Counter Plaintiffs-Appellants,

and

Constellation Place Corporation, and LF Marina Corporation, Counter Plaintiffs-Appellants.

June 28, 1993.

Appeals from the United States District Court for the Southern District of Texas.

Before POLITZ, Chief Judge, DUHÉ, Circuit Judge, and MAHON[1], District Judge.

DUHÉ, Circuit Judge:

Two marina floating dock systems began to lose buoyancy. The manufacturer of the polyurethane flotation foam used in the docks' construction was notified that its product may be defective. In a

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[1]District Judge of the Northern District of Texas, sitting by designation.

preemptive move, the foam manufacturer sued for declaratory judgment, requesting that the court determine what liability, if any, it may have for the docks' problems. The designer, builder, and owners of the docks filed counter-claims. A jury found that the flotation foam was not defective, and that the manufacturer was not liable. Finding no reversible error, we affirm.

Background and Procedural History

Two marinas in Baltimore, Maryland, the Anchorage Marina and the Licorice Factory Marina (the "Baltimore Marinas"),[2] were developed by Marina Ventures International, Ltd. ("MVI"). Marina Ventures, Ltd. ("MV")[3] built these facilities using a floating dock

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[2]The marinas are owned by cooperatives made up of the owners of the boat-slips in the respective marinas. Constellation Place Corporation owns the Anchorage Marina, and LF Marina Corporation owns the Licorice Factory facility.

[3]These entities will be referred to collectively as "Marina Ventures," unless it is necessary to distinguish between them.

system comprised of laminated wood decking attached to pontoons filled with polyurethane flotation foam. The docks are anchored to a series of pilings driven into the seabed. This construction allows the docks to rise and fall with the tide.

Polythane Systems, Inc. ("PSI") manufactured some of the flotation foam used in the Baltimore Marinas. PSI shipped the foam as two liquids which were later blended together at the jobsites to produce solid foam material.

The marinas began to experience a loss of "freeboard," the distance between the docks and the water. Marina Ventures requested that PSI send a representative to inspect this problem. PSI declined to do so, stating that there was no indication that the loss of freeboard was attributable to their foam; moreover, there was a question as to whether PSI foam was used in the problem areas.

In reaction to Marina Ventures' allegations that it had sold defective flotation foam, PSI filed a declaratory judgment action in district court in Texas. Marina

Ventures responded with motions to dismiss for lack of personal jurisdiction, and to transfer the action to the District of Maryland, where they were involved in litigation against another flotation foam manufacturer. A magistrate judge recommended against transfer, and that personal jurisdiction over the Appellants was properly exercised. The district court adopted these conclusions. Trial proceeded, and the jury returned a verdict against the Appellants. The court then assessed costs against Marina Ventures. We are urged to find error in a host of actions taken by the district court, including its assessment of costs against Appellants.

Discussion

1. *Personal Jurisdiction*

Appellants first contend that the district court improperly exercised personal jurisdiction over them. Marina Ventures International, Ltd. ("MVI"), and Marina Ventures, Ltd. ("MV"), are both organized under the laws of Maryland; neither maintains an office or an agent for service of process in Texas. The owners of the respective marinas have no contacts with Texas. PSI is a Texas

corporation, whose principal place of business is Spring, Texas. Diversity of the parties provided jurisdiction for PSI's declaratory judgment petition. 28 U.S.C. § 1332(a).

MVI was responsible for paying suppliers, including PSI, and for providing financing for these projects. *See* R. vol. III, at 440 (Deposition of Gary Sheide); *Id.* at 427 (Deposition of Gale J. Brimhall). Floatec International Corp., a Texas corporation, was engaged by MVI to apply the polyurethane foam supplied by PSI.

MV actually built the marinas. The orders for PSI flotation foam were placed on MV purchase-order forms, and were often signed by Gary Sheide, MV's president. PSI would mix the components for the foam at their Texas facility, and ship the drums "F.O.B. Plant." Payments were made via mail to PSI in Texas.

"A nonresident defendant is amenable to personal jurisdiction in a federal diversity suit to the extent permitted by a state court in the state in which the federal court resides." *Bullion v. Gillespie*, 895 F.2d 213, 215 (5th Cir.1990) (citing *Cycles, Ltd. v. W.J. Digby, Inc.*,

889 F.2d 612, 616 (5th Cir.1989); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1264 (5th Cir.1983)). Our inquiry thus starts with a review of the Texas Long-Arm Statute.[4] Next, we address whether the statutory exercise of jurisdiction comports with the due process concerns of the fourteenth amendment. *See Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 193, 121 L.Ed.2d 136 (1992).

The Texas Long-Arm Statute reaches as far as constitutionally permitted, and the personal jurisdiction inquiry collapses into one of due process only. *Bullion*, 895 F.2d at 216; *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 372-73 (5th Cir.1987). This results in the familiar two-pronged analysis: (1) minimum contacts with the forum state; and (2) the exercise of personal jurisdiction, under the circumstances, must not offend "traditional notions of fair play and substantial justice." *Command-*

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[4]Tex.Civ.Prac. & Rem.Code Ann. §§ 17.041-.045 (Vernon 1986).

Aire Corp. v. Ontario Mechanical Sales & Service, Inc., 963 F.2d 90, 94 (5th Cir.1992) (internal citations omitted).

Personal jurisdiction over a nonresident defendant can be general or specific. *Bullion*, 895 F.2d at 216. General jurisdiction arises when the nonresident defendant maintains systematic and continuous contacts with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984).

In the instant dispute, the Appellants' contacts with Texas cannot support general jurisdiction. Therefore, we review whether the court properly exercised specific jurisdiction. Physical presence in the forum state is not determinative; rather "[t]he appropriate inquiry is whether the defendant purposefully availed [itself] of the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state's laws.... Jurisdiction is improper if grounded in the unilateral

activity of the plaintiff." *Bullion*, 895 F.2d at 216 (internal citations omitted).[5]

Appellants MV and MVI purposefully availed themselves of the privilege of conducting business in Texas. At the outset, we note that the contract, as evinced by the purchase orders and corresponding invoices, shows that the mixing and packaging of the flotation foam was performed in Texas. The place where the contract is performed is a "weighty consideration" in ascertaining whether or not specific jurisdiction is properly exercised. *Command-Aire Corp.*, 963 F.2d at 94. Once mixed, the foam was delivered to a common carrier in Texas, where title passed to PSI.[6] *See Bearry v. Beech*

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[5]*See also Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 643 (5th Cir.1980) (" "[T]he operative consideration is that the defendant's contacts with the forum state were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise.' ") (quoting *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir.1974)), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981).

[6]*See* Tex.Bus. & Com.Code § 2.401 (Vernon 1968) (Title passes at "the time and place at which the seller com-

Aircraft Corp., 818 F.2d 370, 372-73 (5th Cir.1987) (location where title passes is factor in analyzing jurisdictional question). Payments were made to PSI, by mail, at its Texas offices. This buyer-seller relationship continued for over three years. MVI also engaged Floatec, another Texas corporation, to apply the flotation foam supplied by PSI. Furthermore, both the Appellee's declaratory judgment action and the Appellants' counter-claims stem from the sales of flotation foam.

Aggregating the Appellants' contacts with Texas, it is clear that their connections " "were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable....' " *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 643 (5th Cir.1980) (quoting *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th

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pletes performance with reference to the physical delivery of the goods[.]"). PSI's invoice stated that the place of delivery was "F.O.B. Plant." Consequently, PSI's obligations as a seller were complete when it placed the foam in possession of the common carrier at its Texas plant. *See* Tex.Bus. & Com.Code § 2.319(a)(1) (Vernon 1968).

Cir.1974)), *cert. denied,* 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981).

Turning to the second prong of the due process inquiry, we evaluate whether the exercise of jurisdiction over the Appellants offends "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 105, 107 S.Ct. 1026, 1028, 94 L.Ed.2d 92 (1987); *see Command-Aire Corp.,* 963 F.2d at 94; *Bullion,* 895 F.2d at 216. The *Command-Aire Corp.* court noted that "[t]his assessment requires examination of the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the shared interest of the several states in furthering fundamental social policies." *Command-Aire Corp.,* 963 F.2d at 95.

Although Texas may be less convenient for Appellants than a Maryland forum, we cannot say that prosecution of the action in Texas was unreasonable or unfair. Marina Ventures was able to lodge its counter-claims in responding to PSI's petition for declaratory judgment. No witnesses or documents were shown to be unavailable to Appellants in Texas, despite

the distance from Marina Ventures' offices in Maryland. The forum state's interest stems from the involvement of two of its corporate citizens in this action—PSI and Floatec. PSI, as the declaratory judgment plaintiff, assuredly had an interest in ascertaining what liability it may have for the marinas' problems. PSI likewise would have a legitimate interest in defending its product's reputation against Appellants' claims that the flotation foam was defective.

Determinations regarding the exercise of personal jurisdiction over non-resident defendants must be made on a case-by-case basis. *See D.J. Investments, Inc., v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 544 (5th Cir.1985). On balance, the Appellants have failed to persuade us that the proceedings in Texas were offensive to the notions of fair play or substantial justice. The parties had an ongoing business relationship, and the Appellants' contacts with the forum state were not fortuitous. Personal jurisdiction was appropriately exercised. *See Command-Aire Corp.*, 963 F.2d at 95; *D.J. Investments, Inc.*, 754 F.2d at 547-48. *Compare Holt Oil &*

Gas Corp. v. Harvey, 801 F.2d 773 (5th Cir.1986) (single contract executed in forum state insufficient to support specific jurisdiction), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1892, 95 L.Ed.2d 499 (1987); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir.1983) (goods manufactured in Texas, payment made there, and buyer's representative visited state, *held* not dispositive on jurisdictional issue; contract repeatedly stated that all disputes governed by Alaskan law), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 561 (1984).[7]

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[7]PSI's invoices contained a provision stating, "It is mutually agreed by and between the parties hereto that this contract shall be construed under the laws of the State of Texas." This language is located on the back of the invoices. A purchaser's attention is directed to the invoice's flip-side by a disclaimer at the bottom of the invoice:

> TERMS AND CONDITIONS: NOTWITHSTANDING ANY CONTRARY OR INCONSISTENT CONDITIONS THAT MAY BE EMBODIED IN YOUR PURCHASE ORDER, YOUR ORDER IS ACCEPTED SUBJECT TO THE ... TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE THEREOF.

2. *Forum Non Conveniens*

"We review the district court's forum non conveniens determination for abuse of discretion." *Command-Aire Corp.*, 963 F.2d at 95. In response to a motion for dismissal on the basis of forum non conveniens, the court must first ascertain that there is a suitable alternative forum, and then balance the private and public interest factors. *Id.* (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). Additionally, while district courts should normally respect a plaintiff's forum choice, "[c]onvenience is at the heart of the inquiry." *Id.* (citing *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368 (5th Cir.1992)). The district court found that: (1) the majority of PSI's witnesses and all of its documents were

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Between merchants, additional terms in the acceptance of an offer become part of the contract, unless (1) the offer limits acceptance to its terms; (2) the terms materially alter the offer; (3) the offeror gives seasonable notice that he objects to the new terms. Tex.Bus. & Com.Code § 2.207(b) (Vernon 1968).

located in Texas; (2) Marina Ventures' expert, counsel, and the majority of their documents were located in Louisiana; and (3) Marina Ventures made no showing of necessary witnesses residing in Maryland who would be unable to attend the trial in Texas. R.vol. III, at 636. The record bears out the correctness of these findings. The district court did not abuse its discretion in denying transfer on the basis of forum non conveniens.

3. *Admission of Expert's Report*

During the cross-examination of Eric Walle, Marina Ventures' expert witness, counsel for PSI engaged him in the following exchange:

> PSI COUNSEL: Now, you mentioned—you referred to Dr. Kaye's report. You have reviewed Dr. Kaye's report, have you not?
>
> WALLE: That's correct.
>
> COUNSEL: And you've used Dr. Kaye's reports in coming to your opinions?
>
> WALLE: Some of it, yes.
>
> COUNSEL: And you relied upon that report when you gave your deposition, when you gave your opinions; is that correct?

WALLE: That's correct.

R.vol. VIII, at 413-14. Dr. Howard Kaye was listed in the pretrial order as a testifying expert witness for PSI. However, he did not testify. On the basis of Walle's reliance on Kaye's report, PSI offered it into evidence. Appellants' counsel promptly objected, but the court admitted the document.[8]

The fact that Marina Ventures' expert relied on portions of Kaye's report does not make the report admissible. Federal Rule of Evidence 705 provides that an expert may give an opinion on a matter without prior disclosure of the facts or data underlying his opinion, unless the court requires otherwise. "The expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed.R.Evid. 705. While

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[8]Kaye's report contradicted testing done by Marina Ventures' experts regarding the closed-cell content of the flotation foam. A higher percentage of closed cells is desirable, as this molecular structure is less likely to be permeated by water. Kaye's tests indicated that the PSI foam met Marina Ventures' specifications.

revealing the basis for an expert's opinion is allowed, such disclosure does not facilitate the admission of otherwise inadmissible evidence. *See United States v. Mest*, 789 F.2d 1069, 1073-74 (4th Cir.1986); *United States v. Dyer*, 752 F.2d 591, 593 (11th Cir.1985); *Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1055 (5th Cir.1981); *Bryan v. John Bean Division of FMC Corp.*, 566 F.2d 541, 546-47 (5th Cir.1978).

In *Box v. Swindle*, 306 F.2d 882 (5th Cir.1962), a pre-Federal Rules of Evidence case, we held that the contents of a report prepared by a non-testifying expert could be admitted if a testifying expert bases his present opinion on, or testifies directly from, such a report. *Id.* at 887. Certain limitations apply, however, and the evidence should be admitted only for the limited purpose of discrediting or impeaching the testifying expert and the jury should be carefully instructed about its restricted use. *Id.* This reasoning was carried over into cases decided after the Federal Rules of Evidence were adopted. *See Bryan v. John Bean Div. of FMC Corp.*,

566 F.2d 541, 546 (5th Cir.1978). *Bryan* is especially instructive on this point.

In *Bryan*, the Defendant's testifying metallurgical expert (Walters) based his opinion partially on the reports of two nontestifying experts—one expert for the Plaintiff, and one expert for the Defendant. Both of these experts had compiled written reports of their findings, and each report contained opinions on the ultimate issue in dispute. On the cross-examination of Walters, Plaintiff's counsel referred extensively to these reports, quoting from them verbatim. Later, counsel referred to them in his jury arguments. The *Bryan* court noted that, "He made much greater use of the opinions than of the data underlying them." *Id.* at 544. The Defendant objected to the use of these non-testifying expert reports on the ground that, although the facts recited in the reports might be admissible, the opinions of the non-testifying experts were not. The district court overruled this objection, stating that the opinions were admissible because they were supporting data for Walters's opinion. The court gave a limiting instruction

that the reports were only to be considered as the basis for the testifying expert's opinion.

On appeal, the admission of information contained in these reports was held to be reversible error. The excerpts quoted by Plaintiff's counsel lacked any independent guarantee of trustworthiness that would have justified dispensing with cross-examination of the expert who prepared the report. *Id.* at 546. Additionally, the *Bryan* court stated that "to admit the hearsay opinion of an expert not subject to cross-examination goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render an opinion." *Id.* at 546.

We are faced with such a dilemma in the present case. There was no opportunity to cross-examine Kaye regarding the methodology he employed, statistical discrepancies in his report, or any other matters which might illuminate shortcomings in his work. Moreover, PSI used Kaye's report in a substantive manner—counsel

was able to introduce Kaye's conclusions into evidence.[9] This is well beyond the limits discussed in *Box v. Swindle* or *Bryan*. Consequently, the admission of Kaye's report was error. This does not end our inquiry. We must address whether the error was harmless under Federal Rule of Civil Procedure 61.[10] *See United States v. Scott,*

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[9]*See Bryan*, 566 F.2d at 546-47:

> The fact that other experts reached a different conclusion goes to the weight of Walters's conclusions. Since Walters's testimony could only be undercut by arguing the substantive correctness of the other expert's conclusions, this evidence should have been brought out, if at all, on direct examination of the reporting experts. As it occurred in trial, however, the nonimpeaching evidence was argued substantively, violating the hearsay rule, without permitting cross-examination to the defendants.

[10]Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict ... unless refusal to take such action appears to the court inconsistent with substantial justice. The

678 F.2d 606, 612 (5th Cir.), *cert. denied*, 459 U.S. 972, 103 S.Ct. 304, 74 L.Ed.2d 285 (1982). We will not disturb an evidentiary ruling, albeit an erroneous one, unless it affects a substantial right of the complaining party. *See* Fed.R.Evid. 103(a); *Foster v. Ford Motor Co.*, 621 F.2d 715, 721 (5th Cir.1980).

The introduction of Kaye's report occurred on the third day of a four day jury trial, which produced a trial transcript in excess of nine hundred pages. Including the predicate testimony quoted above, seven pages contain discussions regarding the report's results. *See* R.vol. VIII, at 413-19. The thrust of this discussion was aimed at rebutting Marina Ventures' expert's contention that PSI sold Marina Ventures defective foam.

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court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed.R.Civ.P. 61; *see also* Fed.R.Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]").

That experts differ on whether or not a product is defective is not unusual; the flaw in this case was that the contradicting opinion was offered in the form of hearsay evidence. If this was the only evidentiary peg on which the jury could hang its verdict, the report's admission would be reversible error. Such is not the case; the Appellee offered several explanations for the loss of freeboard at the Baltimore Marinas.[11] Considering the record as a whole, we conclude that the erroneous admission of Kaye's report was harmless and did not effect any substantial rights of Appellants. *See*

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[11]For example, PSI offered testimony that it was improper to copy a marina design in a "cookie cutter fashion," as Appellants had done with the Licorice Factory Marina. *See* R.vol. IX, at 719. Also, there was evidence presented that the laminated wood decking contained too much oil, and that this caused caulking between the pontoons and the decking to crack and fall off. Water entered the pontoon shells and could not escape, thus increasing their weight and decreasing their buoyancy. *Id.* at 680. Finally, much was made of the fact that Marina Ventures did not have a professional engineer on its staff at the time the Licorice Factory Marina was built. *See* R.vol. VII, at 133-39.

Koonce v. Quaker Safety Products & Mfg. Co., 798 F.2d 700, 720 (5th Cir.1986); *Pregeant v. Pan American World Airways, Inc.*, 762 F.2d 1245, 1249 (5th Cir.1985); *see also United States v. Underwood*, 588 F.2d 1073, 1076 (5th Cir.1979), ("An error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict.").

4. *Witness Sequestration*

The district court imposed the witness sequestration rule, and excluded all witnesses from the courtroom proceedings. Fed.R.Evid. 615.[12] Appellants

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[12]Federal Rule of Evidence 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

argue the district court erred in excluding Elige Grant, Marine Venture's in-house engineer, after Grant completed his testimony. In Grant's absence, the Appellants maintain they were unable to effectively cross-examine Guerry Taylor, PSI's expert witness. Alternatively, it is urged that the court erred in not permitting Grant to retake the stand for rebuttal purposes.

Appellants contend that Grant should have been exempt from the sequestration order as a person whose presence during the proceedings is "essential to the presentation of [its] cause." Fed.R.Evid. 615(3).[13] Whether or not a witness is essential, and hence should be exempt from Rule 615 exclusion, is a matter soundly

---

[13]While Appellants do not cite to this subsection, 615(3) is the only exception that Grant could fall under. The first exception is not relevant (party who is a natural person). The second proviso, representative of a party which is not a natural person, is also inapplicable. Appellants' counsel designated Gary Sheide, President of Marina Ventures, Ltd., and Scott Stevenson, President of Marina Ventures International, Ltd., as the representatives for the corporate Appellants. *See* R.vol. VI, at 24.

within the discretion of the trial court. We will not upset this determination absent an abuse of that discretion. *See United States v. Agnes*, 753 F.2d 293, 306 (3rd Cir.1985); *Government of Virgin Islands v. Edinborough*, 625 F.2d 472, 475 (3rd Cir.1980); *Windsor Shirt Co. v. New Jersey Nat'l Bank*, 793 F.Supp. 589, 617 (E.D.Pa.1992).

Expert witnesses clearly fall within Rule 615(3)'s exception. The Advisory Committee's notes state that 615(3) "contemplates such persons as an agent who handled the transaction ... or an expert needed to advise counsel in the management of the litigation." Fed.R.Evid. 615 advisory committee's note. We have previously acknowledged as much. *See T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 384 (5th Cir.1980) (court "probably required" to allow expert to remain in courtroom). The *T.J. Stevenson & Co.* court cited *Morvant v. Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.1978), *cert. denied*, 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), as support for this proposition. *Morvant*, is particularly instructive on this point:

> We perceive little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case.... Theoretically at least, the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and in most cases will be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury.

Morvant, 570 F.2d at 629-30.

The reasoning of *Morvant* does not apply to this case for several reasons. First, Grant was not designated as a Rule 702 expert witness. Appellants' tendered Grant only as a Rule 701 lay witness whose opinions were based on his personal perceptions. *See* R.vol. VIII, at 358. Rule 615(3) does not indicate that a Rule 702 expert witness designation is a prerequisite for exemption; 615(3) requires a showing that a person is "essential" to the presentation of a case. However, Grant was going to testify as a fact witness and not as an expert giving opinion testimony based on the testimony of others. Grant's exception from the sequestration order may well

have violated the policy reasons behind Rule 615, *i.e.* preventing witnesses from "tailoring" their testimony. *See Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373-74 (5th Cir.1981); *Morvant*, 570 F.2d at 629-30; *Skidmore v. Northwest Engineering Co.*, 90 F.R.D. 75, 76 (S.D.Fla.1981).

Discussion over Grant's ability to assist counsel in the cross-examination of PSI's expert witness is also relevant:

> COUNSEL: I don't have an expert on this. This was the man that was to annotate this thing for me.
>
> THE COURT: I can't help that. I admonished both counsel at the pretrial conference that it would be the responsibility of counsel to bring to the Court's attention who fell within or out of the rule, and those were clear and unambiguous instructions.
>
> COUNSEL: You're basically correct.

Id. at 434-35. Both parties were given the opportunity to exempt necessary participants from the reach of the court's Rule 615 order. Appellants did not avail themselves of this opportunity. After a careful review of

the record, we are unpersuaded that the district court's actions, in respect to the exclusion of Grant, was an abuse of discretion.

5. *Evidentiary Errors*

A. *Problems with Boston and Hong Kong Marinas*

Appellants complain that the court erred in permitting testimony concerning problems experienced at marinas in Hong Kong and Boston. These marinas were also built by Appellants using the floating dock design employed in the Baltimore Marinas. We fail to see how Appellants can claim error regarding the introduction of testimony on the Boston marina. During the direct examination of its first witness, Marina Ventures' itself placed into evidence a video tape of that facility. *See* R.vol. VII, at 63.

Marina Ventures opened the door on the subject of the Hong Kong project when Gary Sheide testified that Marina Ventures was working on a project in Hong Kong, *see* R. vol. VII, at 83; and that no other Marina Ventures project experienced loss of freeboard. *Id.* at 72.

Appellee was entitled to rebut that testimony. *See Jones v. Southern Pac. R.R.*, 962 F.2d 447, 450 (5th Cir.1992).

PSI then cross-examined Marina Ventures' expert witness on the subject. *See* R.vol. VII, at 373. Later, PSI's expert testified on the similarity of the problems being experienced by the Baltimore and Hong Kong marinas. *Id.* at 535. On cross, Marina Ventures questioned him on the basis for his opinion. *Id.* at 561. As its last rebuttal witness, Marina Ventures recalled Dwayne Stevenson to testify extensively on the problems being experienced with the Hong Kong marina. *See* R.vol. IX, at 831-33.

We conclude that it was not error to admit evidence regarding the Hong Kong project, and if it was error, it was harmless. *See United States v. Underwood*, 588 F.2d 1073, 1076 (5th Cir.1979).

B. *Subsequent Remedial Measures*

Appellants invite us to find error in the district court's ruling which allowed testimony concerning Marina Ventures' decision to put tops or seals on their pontoons. We decline to accept this invitation.

Evidence of subsequent remedial measures is inadmissible as evidence of a party's negligence. Fed.R.Evid. 407. Such evidence is permitted for other purposes, *e.g.* impeachment or to show feasibility of such measures. *See id.* advisory committee's note; *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 763 (5th Cir.1989). Here, Marina Ventures offered evidence that tops were not necessary to keep water out of the pontoons, and that their floating dock system is "one of the strongest in the world." R.vol. VIII, at 361 (testimony of Elige Grant); *see also* R.vol. VII, at 305 (testimony of Wayne Werner).

PSI offered the remedial evidence as an alternative explanation for the loss of freeboard at the Baltimore Marinas. Evidence of the remedial measures was not offered as proof of Marina Ventures' negligence, and the district court did not err in permitting it. *See Muzyka v. Remington Arms Co.*, 774 F.2d 1309, 1313 (5th Cir.1985) (Testimony that rifle was "best, strongest, safest rifle" opened the door for evidence that rifle had been redesigned subsequent to accident; necessary for

"impeachment of the experts who spoke in these superlatives.").

6. *Costs*

The district court assessed costs against Appellants as permitted by 28 U.S.C. § 1920 (1988). We review this award for abuse of discretion. *Fogleman v. Aramco,* 920 F.2d 278, 285 (5th Cir.1991). A bill-of-costs hearing was held and extensive testimony was presented. *See* R.vol XI (transcript of cost hearing). After carefully considering this evidence and reducing Appellee's requested fees for copies and exemplifications, the court assessed costs against Appellants. We are unpersuaded that the district court abused its discretion in this matter.

Conclusion

After a thorough review of the record, we conclude that the other errors urged by the Appellants are without merit.

For the foregoing reasons, the judgment of the district court is, in all respects, AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL LTD. AND MARINE VENTURES, INC.
Defendant.

ORDER

Came on to be heard the Agreed Motion of Plaintiff, Polythane Systems, Inc., establishing deadlines for expert reports and requiring advance notice of inspections, testing and the taking of samples. The Court having considered the Motion, is of the opinion that the Motion should be in all things granted. It is therefore,

ORDERED that all factual observations, tests, supporting data, calculations or opinions of an expert designated by Defendant/Counter-Plaintiff Marina Ventures International, Ltd. and Marina Ventures, Ltd. shall be reduced to a tangible written form and produced to opposing counsel on or before April 5, 1991. It is further,

ORDERED that all factual observations, tests, supporting data, calculations or opinions of an expert designated by Plaintiff/Counter-Defendant Polythane Systems, Inc. shall be reduced to a tangible written form and produced to opposing counsel on or before May 17, 1991. It is further,

ORDERED that any party inspecting, testing or taking samples from the Anchorage Marina or Licorice Factory Marina located in Baltimore Maryland shall give counsel for the opposing party ten (10) days written notice specifying the time and date of the inspection, testing or- taking of samples. Such notice shall include an offer to permit the opposing party and its experts to attend, observe, inspect, test, or take samples at the noticed time .

SIGNED this 2nd day of APRIL, 1991.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL
LTD. AND MARINE VENTURES, INC.
Defendant.

ORDER

On the 24th day of May, 1991, the Court conducted a hearing on pending motions in the above styled and numbered cause. The Court, having reviewed the pleadings and heard the argument of counsel is of the opinion that the following findings and orders are appropriate.

It is ORDERED that Plaintiff shall have until June 14, 1991, to produce the reports of its experts.

It is further ORDERED that the deposition of Eric Walle, Defendant's expert, now scheduled for May 28, 1991, be, and it is hereby Canceled and it shall be taken, if at all, after June 14, 1991, but before the discovery deadline currently imposed by this Court's Docket

Control Order; the Court will not entertain any requests for an order to require this deposition after the discovery deadline has passed.

Upon the representation by Plaintiff to the Court that it has produced all documents requested by Defendants, it is ORDERED that Plaintiff shall be limited, at trial, to the use, including for purposes of impeachment, of only those documents produced prior to the date of this hearing.

Defendant's Motion to Compel and Defendant's Motion to Overrule Objections, Traverse Insufficient and Evasive Answers, Compel Further and Proper Answers to Interrogatories and Responses to Requests for Production, and for Sanctions, having been rendered moot by the foregoing order herein, are, therefore, DENIED.

The Court finds that Defendant's opposition to Plaintiff's Motion to Compel heard on May 14, 1991, was not substantially justified, therefore, it is ORDERED that, pursuant to Rule 37, Plaintiff is entitled to an award of expenses in an amount of $1,200 which shall be payable

at the office of the attorney for Plaintiff on or before July 1, 1991.

DONE at Galveston, Texas, this 24th dav of May, 1991.

JOHN R. FROESCHNER
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL
LTD. AND MARINE VENTURES, INC.
Defendant.

FINDINGS AND RECOMMENDATIONS

On May 24, 1991 a hearing was held before this Court on the Motion of Marina Ventures Internationale, Ltd. and Marina Ventures, Ltd. to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and to Transfer Counterclaim to the District of Maryland. Having considered the pleadings and memoranda on file and having heard the arguments of counsel, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. To the extent that any finding of fact is more properly considered a conclusion of law, it is adopted as such.

The Parties

2. Polythane Systems, Inc. ("PSI") is a Texas corporation whose principal place of business is in Spring, Texas.

3. PSI is a manufacturer of chemical components (the "Foam Components") that are shipped in drums to a purchaser and mixed by the purchaser to create a rigid polyurethane foam.

4. Marina Ventures Internationale, Ltd. ("MVI") is a Maryland corporation, incorporated under the laws of the State of Maryland on May 9, 1985, and does not maintain a regular place of business or a designated agent for service in Texas. MVI is a marina developer.

5. Marina Ventures, Ltd. ("MV") is a Maryland corporation, incorporated under the laws of the State of Maryland on April 15, 1986, and does not maintain a regular place of business or a designated agent for service in Texas. MV designs, engineers and constructs marinas.

MVI Contacts

6. Marinas Internationale, Ltd. ("MI") was a marina development, engineering and construction company. The principals of MV and MVI were at one time principals of MI.

7. MI had a contract to provide engineering, manufacturing and purchasing services to MVI for the construction and development of the Anchorage Marina in Baltimore, Maryland.

8. In June, 1985, MI filed for protection under Chapter 11 of the United States Bankruptcy Code.

9. Subsequent to MI's bankruptcy filing, MVI assumed MI's responsibilities for the Anchorage Marina and other marinas with which MI was involved. These responsibilities included purchasing the materials to be used in marina construction.

10. Floatec International, Corp. ("Floatec") is a Texas corporation whose principal place of business is in Texas.

11. MVI entered into a contract with Floatec, pursuant to which Floatec was to mix and apply PSI's

Foam Components for MVI at Anchorage Marina in Baltimore, Maryland (collectively the "Baltimore Marinas"). The contractual relationship between Floatec and MVI continued for a period of over three years.

12. The Foam Components were manufactured by PSI in Texas pursuant to instructions provided by MI, MVI, MV and Floatec.

13. From the fall of 1985 through April, 1986, MVI purchased Foam Components from PSI's Texas manufacturing facility for various sites, including the Baltimore Marinas.

14. MVI's Foam Component purchases were initiated by Floatec and Gary Schiede ("Schiede") a shareholder and director in MVI and MV and an employee and shareholder of MI until 1986. Floatec would telephone PSI from its Texas office to discuss MVI's Foam Component requirements. Subsequently, Schiede would telephone PSI in Texas to negotiate and finalize the order. MVI confirmed its telephone orders by mailing written purchase orders to PSI in Texas.

15. In response to MVI's orders, PSI manufactured the Foam Components at its plant in Texas and delivered the Foam Components, FOB PSI's plant, to a common carrier in Texas, who in turn delivered the Foam Components to MVI in Maryland. PSI then invoiced MVI for the Foam Components and received payment in Texas.

16. PSI's invoices contained the following terms and conditions:

(a) Title and risk of loss passed to the buyer upon seller's delivery to a common carrier at the shipping point;

(b) Product was shipped FOB PSI's plant;

(c) Texas law was to be applied to construe the terms of the agreement between the parties;

(d) Payment for the Foam Components was to be remitted to PSI in Texas.

MV Contacts

17. Between April, 1986, and October, 1988, PSI and MV entered into a series of contracts for the purchase of Foam Components.

18. The transactions between PSI and MV were initiated by Floatec and Schiede. Floatec would telephone PSI from its Texas office to discuss MV's Foam Component requirements. Subsequently, Schiede would telephone PSI in Texas to negotiate and finalize the orders. MV confirmed its orders by mailing written purchase orders to PSI in Texas.

19. In response to MV's orders, PSI manufactured the Foam Components at its plant in Texas. PSI delivered the Foam Components, FOB PSI's plant, to a common carrier in Texas who in turn delivered the Foam Components to MV in Maryland. PSI then invoiced MV. MV made payments to PSI in Texas.

20. PSI's invoices to MV contained the following terms and conditions:

(a) Title and risk of loss passed to the buyer in Texas upon seller's delivery to a common carrier at the shipping point;

(b) Product was shipped FOB PSI's plant in Texas;

(c) Texas law was to be applied to construe the terms of the agreement between the parties; and

(d) Payment was to be remitted to PSI in Texas.

21. The contracts between PSI and MVI and between PSI and MV were formed in Texas and the material obligations of the parties thereto were performed in Texas.

VENUE

22. The majority of PSI's witnesses are located in the Southern District of Texas. All of PSI's documents are located in the Southern District of Texas.

23. MVI's and MV's expert, counsel and the majority of their documents are located in Louisiana.

24. MVI and MV have offered no evidence as to the necessity of potential witnesses that reside in Maryland. Moreover, MVI and MV have offered no evidence of hardship to these witnesses sufficient to justify transfer to Maryland.

25. MVI and MV have offered no evidence as to the necessity of its witnesses located in Mexico, Hong

Kong and Montana. Moreover, the Southern District of Texas is equally convenient for these witnesses.

CONCLUSIONS OF LAW

1. To the extent any conclusion of law is more properly considered a finding of fact, it is adopted as such.

2. MVI and MV entered into a series of contracts with PSI. The contracts were initiated by MVI and MV. The last act necessary to contract formation occurred in Texas where PSI accepted the contracts and began manufacture of the Foam Components. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490 (5th Cir. 1974).

3. MVI and MV are non-residents of Texas who do not maintain a regular place of business or a designated agent for service in Texas and who contracted by mail or otherwise with a Texas resident. The contracts were to be performed in Texas. Consequently, MV is subject to service of process by substitute service on the Texas Secretary of State pursuant to the Texas LongArm

Statute, Tex. Civ. Prac. & Rem. Code 17.041-045 (Vernons 1986 and Supp. 1991).

4. MVI and MV initiated contacts and contracts with Texas purposely directed towards Texas residents. These contacts and contracts continued for a significant period of time and created a substantial connection with Texas. Having initiated contracts with Texas residents, MVI and MV purposefully availed themselves of the laws of the State of Texas and could reasonably anticipate being hailed into court in Texas. MVI's and MV's contacts with Texas are sufficiently continuous and systematic to warrant the exercise of general jurisdiction by the Southern District of Texas over the persons of MVI and MV. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

5. Alternatively, this litigation arises out of the contacts and contracts initiated by MV and MVI and entered into between MV and PSI and MVI and PSI, resulting in sufficient minimum contacts for the exercise of specific jurisdiction by the Southern District of Texas

over the persons of MV and *MVI.* Helicopteros Nacionales de *Colombia S.A. v Hall, 466 U.S. 408* (1984) *Schlobohm v. Schaprio,* 784 S.W.2d 355 (Tex. 1990).

6. MVI and MV have failed to present a compelling case that renders the jurisdiction of the Southern District of Texas over their persons so unreasonable as to amount to a denial of due process. Burqer *Ring v.* Rudzewicz, 462 (1985); Product Promotions v. Cousteau, 495 F.2d 483 (5th Cir. 1974).

7. The Southern District of Texas has a legitimate interest in providing a forum for disputes arising out of contracts made in Texas with a Texas resident and to be performed in Texas. PSI may obtain the most efficient resolution of the issues raised in this case in this District and no policy is offended by the maintenance of jurisdiction here. *Burqer King v.* Rudzewicz, 471 U.S. 462 (1985).

8. The exercise of jurisdiction over the persons of MV and MVI by the Southern District Court of Texas is consistent with the Texas Long-Arm Statute and with the due process requirements of the 14th Amendment of the

U.S. Constitution. *Nolt Oil & Gas Co. v.* Harvey, 801 F.2d 73 (5th Cir. 1986).

9. The Southern District of Texas has jurisdiction over the persons of MVI and MV, consequently, venue of this action is proper in the Southern District of Texas pursuant to 28 U.S.C. 1391(c).

10. MV and MVI have not made a clear showing that a balancing this cause to Maryland. *First Nat'l City Bank v. Nanz, Inc.*, 437 F.Supp. 184 (D.C.N.Y. 1975).

11. MV and MVI have not specified key witnesses to be called or given some indication of their expected testimony or significance. *James v. Norfolk and W. Ry. Co.*, 430 F. Supp. 1317 (D.C. Ohio 1976).

12. This Court should not transfer venue or of this cause where the result would be merely to shift expense and inconvenience from MVI and MV to PSI. *Enserch Intern. Exploration, Inc. v. Attack Oil Co., Ltd.*, 656 F. Supp. 1162 (N.D. Tex. 1987).

13. Under the circumstances of this litigation, PSI's choice of forum should not be disturbed. *United Sonics, Inc. v. Shock*, 661 F.Supp. 681 (W.D. Tex. 1986).

14. Maintenance of venue of this cause in the Southern District of Texas is consistent with the convenience of the parties and witnesses and with the interests of justice. 28 U.S.C. 1404(a).

RECOMMENDATION

Based upon the foregoing Finds of Fact and Conclusions of Law, it is the recommendation of this Court that the Defendants' Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and to Transfer Counterclaim to the District of Maryland should be DENIED.

The Clerk shall send copies of this Recommendation to the objections hereto, pursuant to General Order 80-5. Failure to file written objections within the prescribed time shall bar an aggrieved party from attacking the factual findings on appeal.

Done at Galveston, Texas, this 26th day of June, 1991.

JOHN R. FROESCHNER
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL
LTD. AND MARINE VENTURES, INC.
Defendant.

ORDER

For the reasons stated in the Report and Recommendation of the United States Magistrate Judge, which are hereby adopted by this Court, the Motion of Marina Ventures Internationale, Ltd. and Marina Ventures, Ltd. to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and to Transfer Counterclaim to the District of Maryland is, therefore, DENIED.

DONE AT Galveston, Texas, this 16th day of July , 1991.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL LTD. AND MARINE VENTURES, INC.
Defendant.

VERDICT OF THE JURY

INTERROGATORY NO. 1

Was there a defect in the foam components at the time they left the possession of Polythane Systems, Inc. that was a producing cause of the loss of freeboard of any portion of the Licorice Factory Marina or the Anchorage Marina in which such foam was used?

Answer "Yes" or "No"

ANSWER: no.

INTERROGATORY NO. 2

Did Polythane Systems, Inc. breach any implied warranty of fitness for a particular purpose of its product that was a proximate cause of the loss of freeboard of any

portion of the Licorice Factory Marina or of the Anchorage Marina in which such foam was used?

Answer "Yes" or "No"

ANSWER: NO

INTERROGATORY NO. 3

Did Polythane Systems, Inc.'s alleged express warranty of "two pound density closed cell flotation foam per Dick Wyke specification" become part of the basis of the bargain between the parties?

Answer "Yes" or "No" for each of the following:

Marina Ventures International, Ltd. YES

Marina Ventures, Ltd. YES

If you answer Interrogatory No. 3 "Yes" as to either Marina Ventures International, Ltd., or Marina Ventures, Ltd, please answer Interrogatory No. 4. If not, please proceed to Interrogatory No. 5.

INTERROGATORY NO. 4

Was Polythane Systems, Inc.'s breach of the express warranty of "two pound density closed cell flotation foam per Dick Wyke specification" a proximate cause of the loss of freeboard of any portion of the

Licorice Factory Marina or of the Anchorage Marina in which such foam was used?

Answer "Yes" or "No"

ANSWER: NO

INTERROGATORY NO. 5

Was Polythane Systems, Inc. negligent and, if so, did its negligence proximately cause any of the loss of freeboard of any portion of the Licorice Factory Marina or of the Anchorage Marina in which such foam was used?

Answer "Yes" or "No"

ANSWER NO

If you answer Interrogatory No. 5 "Yes", please answer Interrogatories Nos. 6 and 7. If not, please proceed to Interrogatory No. 8.

INTERROGATORY NO. 6

Was Marina Ventures, Ltd., or Marina Ventures International, Ltd., negligent and, if so, did the negligence of either proximately cause any of the loss of freeboard of any portion of the Licorice Factory Marina

or of the Anchorage Marina in which Polythane Systems, Inc.'s foam was used?

Answer "Yes" or "No"

ANSWER: _____

INTERROGATORY NO. 7

If you have answered "Yes" to both Interrogatories Nos. 5 and 6, please state the percentage of the negligence attributable to the following parties. The total of the percentages attributed must equal 100%.

Polythane Systems, Inc.	_____%
Marina Ventures, Ltd.	_____%
Marina Ventures International, Ltd.	_____%
TOTAL	100%

INTERROGATORY NO. 8

Did Polythane Systems, Inc. engage in any false, misleading, or deceptive act or practice that was a producing cause of damages, to either Marina Ventures, Ltd., or Marina Ventures International, Ltd.?

Answer "Yes" or "No" as to each of the following:

Marina Ventures, Ltd. NO

Marina Ventures International, Ltd. NO

INTERROGATORY NO. 9

Was the claim by either Marina Ventures, Ltd. or Marina Ventures International, Ltd., that Polythane Systems, Inc. engaged in a deceptive act or practice groundless and brought in bad faith or for the purpose of harassment?

Answer "Yes" or "No" to the following:

Marina Ventures, Ltd. NO

Marina Ventures International, Ltd. NO

INTERROGATORY NO. 10

What sum of money, if paid now in cash, would fairly and reasonably compensate for the repairs and replacement to Licorice Factory Marina?

Answer in dollars and cents for damages, if any.

ANSWER: $ 1,019,826

INTERROGATORY NO. 11

What sum of money, if paid now in cash, would fairly and reasonably compensate for the repairs and replacement to Anchorage Marina?

Answer in dollars and cents for damages, if any.

ANSWER: $767,326

9 Dec. 91

Date Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL LTD. AND MARINE VENTURES, INC.
Defendant.

INTERIM JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Samuel B. Kent, United States District Judge presiding, commencing on December 2, 1991, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED, ADJUDGED and DECREED that Plaintiffs Marina Ventures International, Ltd., Marina Ventures, Ltd., L. F. Marina Corporation and Constellation Place Corporation take nothing of and from Defendant Polythane Systems, Inc., and it is further

ORDERED, ADJUDGED and DECREED that counter-Plaintiff Polythane Systems, Inc. take nothing of and from counter-Defendants Marina Ventures

International, Ltd., Marina Ventures, Ltd., L. F. Marina Corporation and Constellation Place Corporation.

Execution shall not issue on this Interim Judgment. Costs herein are taxed against Plaintiffs, counter-Defendants Marina Ventures International, Ltd., Marina Ventures, Ltd., L. F. Marina Corporation and Constellation Place Corporation, subject to appropriate and timely tender of a Bill of Costs.

DONE at Galveston, Texas, this the 9th day of December, 1991,.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL LTD. AND MARINE VENTURES, INC.
Defendant.

FINAL JUDGMENT

This action came on for trial before the court and a jury, Honorable Samuel B. Kent, District Judge, presiding, and issues having been duly tried and a jury having duly rendered this verdict,

Is ORDERED and ADJUDGED that Counter-Plaintiffs Marina Ventures Internationale, Ltd., Marina Ventures, Ltd., Constellation Place Corporation and L.F. Marina Corporation, take nothing and that the action be dismissed on the merits and that Counter-Defendant Polythane Systems, Inc. recover of Counter-Plaintiffs Marina Ventures International, Ltd., Marina Ventures, Ltd., Constellation Place Corporation and L.F. Marina Corporation its costs of action.

This is a Final Judgment. All relief not granted is hereby denied.

SIGNED this 18th day of December, 1991.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL LTD. AND MARINE VENTURES, INC.
Defendant.

ORDER

Before the Court is the Motion for Partial New Trial and For Judgment Notwithstanding the Verdict, of Marina Ventures, Ltd., Marina Ventures International, Ltd., Constellation Place Corporation, and LF Marina Corporation (Marinas). For the reasons briefly herein discussed, said Motion is respectfully DENIED.

Trial of this cause, before a jury, was commenced on Monday, December 2, 1991. The trial proceed for one full trial week, and was remarkably well presented by counsel for both sides. Both counsel were given an opportunity to make a full and complete presentation of necessary witnesses and exhibits, and were accorded adequate and appropriate time for opening statements

and final arguments, as well as the courtesy of substantial participation in the voir dire exercise. A remarkable jury was impaneled in this case, consisted of a registered nurse, an information systems computer analyst, an industrial materials expeditor, a retired worker with substantial years of work force experience, a director of accounting for a large industrial facility, a practicing dentist, a high school librarian, with both a B.S. and M.S. in Library Science, and a certified respiratory therapist. The jury deliberated several hours, and obviously analyzed the case in a thoughtful, painstaking and remarkably competent manner. The jury was asked to answer a number of complicated interrogatories, and did so with remarkable precision.

Without resort to the substantial trial record, and solely based upon this Court's trial notes, this Court emphatically stands by the evidentiary rulings made throughout the conduct of the trial of this case. On each occasion of an evidentiary ruling, this Court did its very best to articulate a citation to the Federal Rules of Evidence, as well as the Court's rationale and thought

process, substantiating each ruling. The Court sincerely believes that the parties received a full and complete hearing on the merits, and that this was as fair and impartial a trial as can be accorded in the Federal Court system.

Given the totality of the circumstances surrounding this case, as hereinabove discussed, and as set out in the Record of this matter, and because the Court agrees with the fairness and propriety of the verdict reached by the jury, the Court respectfully feels that the relief petitioned for is not meritorious. It is accordingly

ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Partial New Trial and For Judgment Notwithstanding the Verdict is consequently DENIED.

The parties are respectfully ORDERED to file no further pleadings on this aspect of the case, before this Court. Any further relief on this point should be sought from the United States Court of Appeals for the Fifth Circuit.

IT IS SO ORDERED.

DONE at Galveston, Texas, this the 23rd day of December, 1991.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

POLYTHANE SYSTEMS, INC.
Plaintiff

VS. CIVIL ACTION NO. H-90-545

MARINE VENTURES INTERNATIONAL
LTD. AND MARINE VENTURES, INC.
Defendant.

ORDER GRANTING MOTION OF MARINAS FOR RECONSIDERATION OF THE MOTION FOR PARTIAL NEW TRIAL OR FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE TO PROFFER PARTIAL MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL, ETC.

Considering the motion of Marina Ventures, Ltd., Marina Ventures Internationale, Ltd., Constellation Place Corporation, and LF Marina Corporation,

IT IS ORDERED That the motion to reconsider, limited to a review of the admission of the report of Dr. Kay, the offered but excluded Marinas' documents, and the prejudicial effect of the undisclosed trial and expert strategy or Polythane, and the Court's denial of the motion for partial new trial and for judgment

notwithstanding the verdict, be and the same is hereby Denied.

Galveston, Texas, this 3d day of February, 1992.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-7058 & 92-7310

POLYHTANE [*Sic*] SYSTEMS, INC.,

Plaintiff-Counter
Defendant-Appellee,

versus

MARINA VENTURES INTERNATIONAL, LTD., and MARINA VENTURES, LTD.,

Defendants-Counter
Plaintiffs-Appellants, and

CONSTELLATION PLACE CORPORATION and LF MARINA CORPORATION,

Counter-Plaintiffs-Appellants

Appeals from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 6/38/93, 5 Cir., S.D. Tex., 993 F.2d 1201)

(August 25, 1993)

Before POLITZ, Chief Judge, DUHE, Circuit Judge ,and MAHON*, District Judge.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé Jr.
United States Circuit Judge

*Senior Judge from the Northern district of Texas, sitting by designation.

Supreme Court, U.S.
FILED
JAN 13 1994
OFFICE OF THE CLERK

(2)

No. 93-993

In The

Supreme Court of the United States

October Term, 1993

MARINA VENTURES INTERNATIONALE, LTD., MARINA VENTURES, LTD., CONSTELLATION PLACE CORPORATION AND LF MARINA CORPORATION,

Petitioners,

versus

POLYTHANE SYSTEMS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.

Should the district court, after denying petitioners' motion to dismiss for lack of personal jurisdiction, have required proof of personal jurisdiction at trial.

2.

Did the district court apply an improper standard of review for harmless error.

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No. 93-993

In The

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October Term, 1993

MARINA VENTURES INTERNATIONALE, LTD.,
MARINA VENTURES, LTD.,
CONSTELLATION PLACE CORPORATION AND LF
MARINA CORPORATION,

Petitioners,

versus

POLYTHANE SYSTEMS, INC.,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF IN OPPOSITION

Respondent, Polythane Systems, Inc., files this brief in opposition to petitioners' petition for certiorari.

REASONS THE WRIT SHOULD BE DENIED

1. The District Court Properly Ruled Upon Petitioners' Motion To Dismiss For Lack of Personal Jurisdiction In A Pretrial Hearing.

Petitioners' petition should be denied because the issues raised in the petition do not meet the requisites for review by this Court and the decision of the Fifth Circuit Court of Appeals is correct.

The Petitioners filed a motion to dismiss for lack of personal jurisdiction. [R.III, 640]. The district court held a hearing and considered memorandums, affidavits, discovery and pleadings offered by both parties. [R.II, 256, 235; R.III, 503, 544, 625]. The district court subsequently denied petitioners' motion to dismiss for lack of personal jurisdiction and issued findings of fact and conclusions of law. [R.III, 640, 642].

It was proper for the district court to rule upon petitioners' motion to dismiss at a pretrial hearing. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir.), *cert. denied*, ___ U.S. ___ 113 S. Ct. 193, 121 L. Ed. 136 (1992).

The Fifth Circuit is in harmony with other circuits and this Court, as evidenced by the very decisions cited by petitioners. *Boit v. Gar-Tec Products*, 967 F.2d 671, 674 (1st Cir. 1992) (proceedings may involve proffers of evidence by affidavits . . . depositions, answers to interrogatories. . . .); *Ball v. Metallurigie Hoboken-Overpelt, S.A.*, 902 F.2d 194 (2nd Cir. 1990); *Volkswagenwrk Aktiengeselishaft*

v. Beach Aircraft Corp., 751 F.2d 117 (2nd Cir. 1984) (confirmed rulings on motions to dismiss for lack of personal jurisdiction at pretrial hearings).

The Sixth Circuit, in *Serras v. First Tennessee Bank, N.A.*, 875 F.2d 1212-1214 (6th Cir. 1989), held the district court may determine a motion to dismiss for lack of personal jurisdiction on the basis of affidavits. The Tenth Circuit, in *Federal Deposit Insurance Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174, held a party may establish jurisdiction either at a pretrial evidentiary hearing or at trial.

Federal Rule of Civil Procedure 12(b)(2) permits a party to assert jurisdictional defenses by pretrial motion. The jurisdictional facts presented to the district court are specifically set out in the district court's findings of fact and conclusions of law [R.III, 640].

Petitioners advocate that a district court, upon denying a motion to dismiss for lack of personal jurisdiction, should also require the parties to introduce jurisdictional evidence at trial. Federal Rule of Civil Procedure 12(b)(2) and decisions of this Court do not place such a requirement upon the district courts.

2. The District Court Applied the Proper Standard Of Review For Harmless Error.

The district court's standard of review for harmless error was within the parameters of Federal Rule of Civil Procedure 61 and *United States v. Scott*, 678 F.2d 606, 612 (5th Cir.) *cert. denied* 459 U.S. 972, 103 S. Ct. 304, 74 L. Ed. 2d 285 (1982).

The Fifth Circuit held that, "Considering the record as a whole, we conclude that the erroneous omission of Dr. Kaye's report was harmless and did not affect any substantial rights of appellants." *Polythane Systems, Inc. v. Marina Ventures Internationale, Ltd. and Marina Ventures, Ltd.*, 993 F.2d 1201, 1209 (5th Cir. 1993).

The Fifth Circuit followed the standard set by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and this Court, by reviewing an evidentiary ruling on whether or not it affected any "substantial rights" of the parties. Such test is consistent with that applied by other circuits, including those referenced by petitioners in their petition. *Williams v. United States Elevator Corp.*, 920 F.2d 1019 (D.C. Cir. 1990); *Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981); *Amatucci v. Delaware and Hudson Railway Co.*, 745 F.2d 180 (2nd Cir. 1984); *Habacker v. Copperloy Corp.*, 893 F.2d 49 (3rd Cir. 1990); *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1979); *Guilbranson v. Duluth, Missabe and Iron Range Railway Co.*, 931 F.2d 139 (8th Cir. 1990); *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985); and *The United States v. One Parcel of Real Estate*, 963 F.2d 1496 (11th Cir. 1992).

In summary, the Fifth Circuit Court of Appeals applied the proper standard of review for harmless error.

CONCLUSION

There is no reason to grant a writ of certiorari in this case, as the Fifth Circuit Court of Appeals' decision is based on settled legal principles and is not in conflict with any other circuit court of appeals.

Respectfully submitted,

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